1984

State of Utah v. Ronnie Lee Cripps : Brief of Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-v-	:	Case No. 19140
RONNIE LEE CRIPPS,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

APPEAL FROM A VERDICT OF GUILTY ENTERED IN THE SEVENTH JUDICIAL DISTRICT COURT IN AND FOR CARBON COUNTY, THE HONORABLE BOYD BUNNELL PRESIDING.

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STATUTES CITED

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BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged by information with Distribution of A Controlled Substance for Value, Utah Code Ann. § 58-37-8 (1)(a)(ii) (1953), as amended.

DISPOSITION IN THE LOWER COURT

Appellant was tried before a jury and found guilty of Distribution of a Controlled Substance for Value on February 25, 1983 in the Seventh Judicial District Court of Carbon County, State of Utah, the Honorable Boyd Bunnell presiding. On April 12, 1983, appellant was sentenced to an indeterminate term of confinement in the Utah State Prison not to exceed five years. Execution of the sentence was suspended and appellant was placed on probation for a period of eighteen months with a thirty day jail term and fined $1,000.00.

RELIEF SOUGHT ON APPEAL

Respondent seeks an order of this Court affirming the verdict and judgment of the trial court.

STATEMENT OF THE FACTS

Undercover Officer Russell Spann of the Narcotics and Liquor Law Enforcement Bureau, Department of Safety of the State of Utah (T. 45) met appellant at a beer-keg party at appellant's residence on June 19, 1981 in Carbonville, Utah (T. 46) Officer Spann had been invited by appellant's roommate earlier that evening while they were at the Comic Book Lounge in Helper, Utah, (T. 55) and arrived at the party around midnight to join approximately thirty other guests (T. 56). While at the party, Office Spann was asking people whether they had any marijuana, cocaine or LSD to sell (T. 58).

During this conversation, appellant asked Spann if Spann could offer him a job at various oil fields (T. 60). Although Spann was posing as an oil field laborer, he did not either offer appellant a job or promise to help appellant find a job (T. 75). In response to Spann's request for a bag of marijuana, appellant "told him it was too late; I didn't know where to get one that time of night, anyway, for sure. But I was drunk and I did tell him I could probably find one the next morning if he wanted to come back." (T. 114-15).

Officer Spann returned to appellant's residence the

next morning but no one was home (T. 62).[1]

Officer Spann had no further contact with appellant (T. 63) until 2:05 p.m. on July 1, 1981. Spann arrived at appellants' residence with Officer Mike Kagie of the West Valley Police Department (T. 76) and Patricia Hall of the Utah State Narcotics Division (T. 83). Neither Spann, Kagie or Hall had notified appellant of their visit (T. 70,80,86). Spann explained to appellant that they were on their way to Monticello, Utah and had just dropped by to see how appellant was doing (T. 47).

Appellant invited the three undercover officers to come into his house and smoke a joint (T. 47). Officers Hall and Kagie sat on a couch in the livingroom (T. 77, 84) as Spann followed appellant into the kitchen (T. 48). Appellant picked up a cookie sheet type pan, a sifter and went to the flour bin from which he pulled out a half pound of marijuana (T. 48). While in the kitchen, Spann asked appellant "if he knew of anybody who had marijuana to sell of if he had any marijuana to sell" (T. 48-49). Appellant replied that he did and asked how much Spann wanted. Spann answered, "A bag" meaning an ounce. (T. 48-49).

Returning to the livingroom, appellant rolled two joints which were passed around (T. 49, 78, 84). At 2:23 p.m.

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[1] Appellant remembered seeing Spann the morning after the party but could not remember going to bed (T. 120) or whether or not he had gone to Salt Lake (T. 121) as he later told Officer Spann (T. 63)).

appellant asked Spann, "Do you still want one?" (T. 49) Spann asked the price (T. 49). Appellant stated the price at $50, to which Spann agreed (T. 49, 78, 84).

Appellant left for the kitchen, returned through the livingroom into a small side room and came back carrying a cardboard box containing scales (T. 49, 78-79, 85). In the kitchen, appellant measured out approxiamtely an ounce of marijuana (T. 52) and took $50 from Officer Spann (T. 49, 79).

After this exchange, Spann inquired whether appellant could either sell or help him buy a pound or half pound of marijuana (T. 50). Appellant said that he usually had a pound on hand, but did not have the quantity at that time (T. 50, 63). But being familiar with the county, appellant claimed to know where one could be obtained and that Spann should contact him again when wanting to purchase more marijuana (T. 50, 63).

Officers Spann, Hall and Kagie then left appellant's residence. An arrest warrant for appellant was issued on December 4, 1981.

Appellant testified that at the June 19 party, agent Spann agreed to "keep an eye open and stop back in and let me know if he heard there was anything open or anything he could help me out with." (T. 114).

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE LEGAL STANDARD FOR ENTRAPMENT.

Appellant contends that Jury Instruction #6 on Entrapment constituted prejudicial error because (a) the instruction required that the police conduct "would be effective" rather than "would create a substantial risk" of the offense being committed, and (6) the "average person" language of the instruction raised the standard of entrapment in violation of statutory definitions making it harder for the appellant to prove entrapment.

Entrapment is an affirmative defense as defined in Utah Code Ann. § 76-2-303 (1)(1953), as amended.

> It is a defense that the actor was entrapped into committing the offense. Entrapment occurs when a law enforcement officer or a person directed by or acting in co-operation with the officer induces the commission of an offense in order to obtain evidence of the commission for prosecution by methods creating a substantial risk that the offense would be committed by one not otherwise ready to commit it. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

Jury Instruciton #6 explained entrapment as:

> The Defendant in this case is asserting the defense of entrapment. Entrapment occurs when a law enforcement officer or a person directed by or acting in cooperation with the officer induces the commission of an offense in order to

> obtain evidence of the commission for prosectuion by methods creating a substantial risk that the offense would be committed by one not otherwise ready to commit it. Conduct merely afording [sic] a person an opportunity to commit an offense does not constitute entrapment.
>
> In assessing police conduct under the defense of entrapment, the test to determine an unlawful entrapment is whether a law enforcement official or an agent, in order to obtain evidence of the commission of an offense, induced the Defendant to commit such an offense by persuasion or inducement which would be effective to presuade [sic] an average person, other than one who was merely given the opportunity to commit the offense.
>
> The Defendant need not prove that entrapment occured [sic] to be entitled to a not guilty verdict; it is sufficient if there exists a reasonable doubt as to whether the offense committed was the product of the Defendant's voluntary will or desire, or was induced by the persistent requests or other inducive conduct of the officer in this case; and if there is such a reasonable doubt when you should find the Defendant not guilty.

(R. 32).

Appellant's first contention stresses the "would be effective" language from the second paragraph of Instruction #6. Jury instructions are not to be considered in isolation, but as a whole. State v. Ruben, Utah, 663 P.2d 445 (1983). State v. Coffey, Utah, 564 P.2d 777 (1977); State v. Crisola, 21 Utah 2d 272, 444 P.2d 517 (1968). Considered as a whole, the purpose of the second paragraph of Instruction #6 was to explain the objective standard of entrapment adopted in State v. Taylor, Utah, 599 P.2d 496 (1979). The emphasis of the second paragraph is the standard of police conduct, not the degree of risk or probability of effect. The first paragraph

of Instruction #6 clearly states the statutory description of "methods creating a substantial risk that the offense would be committed by one not otherwise ready to commit it." Utah Code Ann. § 76-2-303(1), Instruction #6 (R. 32). The jury was instructed clearly that police methods need only create a substantial risk that the offense would be committed by a person not otherwise ready to commit it for there to be entrapment and therefore the instant instruction adhered to the statutory standard.

Appellant's second claim finds fault with the "average person" language from the second paragraph of Instruction #6. Appellant argues that by focusing upon the "average person" the trial court was imposing a more stringent burden on the defendant than is statutorily required. However, the jury instruction read as a whole clearly explained to the jurors the objective standard of entrapment adopted by this Court in State v. Taylor.

Utah had traditionally adopted the subjective test of entrapment as exemplified in State v. Pacheco, 13 Utah 2d 148, 369 P.2d 494, 496 (1962). The subjective test asked (1) whether there was an inducement and (2) if so, whether the defendant showed any predisposition to commit the offense.[2]

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[2] The subjective test is adopted in Sorrells v. United States, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413 (1932); see generally; 62 A.L.R. 3d 110, Anno.: Modern Status of the Law Concerning Entrapment to Commit Narcotics Offense--State Case, § 2(a), P. 114.

Although Pacheco, was construed initially as consistent with the enactment in 1973 of § 76-2-303(1),[3] this Court later recognized that the explicit wording of § 76-2-303(1) incorporates an objective standard of entrapment. State v. Taylor, Utah, 599 P.2d 496 (1979).

The objective test focuses not on the predisposition of the defendant, but "on whether the police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of governmental power." Id. at 500. The test to determine an unlawful entrapment examines whether the officer "induced the defendant to commit such an offense by persuasion or inducement which would be effective to persuade an average person, other than one who was merely given the opportunity to commit the offense." Id. at 503. Examples of prohibited police conduct are "extreme pleas of desperate illness or appeals based primarily on sympathy, pity or close personal friendship or offers of inordinate sums of money." Taylor, at 503; Grossman v. State, 457 P.2d 226-230 (Ak. 1969).

Utah's statute on entrapment follows the format and objective theory set forth in § 2.13(1) of the Model Penal Code, Proposed Official Draft (1962) and the alternative provision offered in Tentative Draft No. 9, § 2.10 Model Penal Code. Taylor at 502. The comments clearly stress that on the

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[3] State v. Curtis, Utah, 542 P.2d 744, 746 (1975).

objective view of entrapement, the mere offer to buy narcotics from someone without a predisposition to sell would not raise the defense unless the offer created a substantial risk of a sale by those who were not ready to commit the offense. Comments § 2.10 at 19. The police agent's offer to buy must create a substantial risk for one without the predisposition in order for entrapment to lie.

Instruction #6 quotes directly the language adopted in Taylor at 503. Read as a whole, Instruction #6 adequately and accurately instructed the jury on the defense of entrapment.

Although appellant does not argue on appeal that he presented sufficient evidence to prove entrapment, appellant was not entrapped on the facts of this case. Officer Spann's behavior was not of such a character as to create a substantial risk that the offense would be committed by one not otherwise ready to commit it. Appellant's response at the June 19 party was not a refusal to sell to Agent Spann but merely a statement of inconvenience or unavailability. On a routine follow-up without great emotional appeal or promises of employment, Agent Spann was invited into appellant's home and offered an ounce of marijuana. Appellant made representations of future sales in larger quantities. Appellant was not entrapped.

CONCLUSION

The trial court properly instructed the jury on the legal standard for entrapment under Utah Code Ann. § 76-2-303(1) (1953), as amended. The objective theory of entrapment was adequately explained when the trial court spoke of police methods creating a substantial risk that the offense would be committed by one not otherwise ready to commit it. The jury instruction was a clear paraphrase of language from State v. Taylor, Utah, 599 P.2d 496 (1979) and this state's entrapment statute. Appellant's conviction should be affirmed.

RESPECTFULLY dated this 15th day of March, 1984.

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CERTIFICATE OF MAILING

I hereby certify that I mailed a true and exact copy of the foregoing brief, postage prepaid to John O'Connell, attorney for appellant, 44 Exchange Place, Salt lake City, Utah 84111, this 15th day of March, 1984.

Kathleen D. Billitteri